

NO. 50163-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

ANTIONE DE'MAURY SHAW,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 16-1-00333-6

BRIEF OF RESPONDENT

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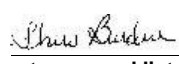
SERVICE	John A. Hays 1402 Broadway Longview, Wa 98632 Email: jahays@3equitycourt.com	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, <i>or, if an email address appears to the left, electronically.</i> I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED September 28, 2017, Port Orchard, WA  Original e-filed at the Court of Appeals; Copy to counsel listed at left. Office ID #91103 kcpa@co.kitsap.wa.us
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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the evidence was sufficient to establish guilt for burglary where the defendant committed theft by unlawfully entering or remaining in an employee-only area of a business?

2. Whether the evidence was sufficient to establish accomplice liability for a theft directly committed by the defendant's confederate?

3. Whether the evidence was sufficient to establish that the defendant had an egregious lack of remorse regarding the commission of his crimes?

II. STATEMENT OF THE CASE¹

A. PROCEDURAL HISTORY

Antione De'Maury Shaw was charged by original information filed in Kitsap County Superior Court with second degree robbery. CP 1. Later, a first amended information was filed charging second degree burglary, third degree theft, second degree theft as an accomplice, and second degree assault. CP 107. Special allegations of lack of remorse were charged with regard to the felony counts—burglary, second degree theft, and second degree assault. Id.

¹ There are three volumes of trial transcripts referred to herein as "1RP" "2RP" and "3RP." Reference to other parts of the record will reference the date of the hearing involved.

A CrR 3.5 hearing was held. 1RP 11 *et seq.* The trial court ruled that Shaw's custodial statements are admissible. CP 212 (Findings and Conclusions).

After the parties rested, the trial court dismissed the second degree assault charge on defense motion. 3RP 288-89. Shaw was convicted on the other three counts. CP 340. The jury also returned a special verdict that Shaw committed the second degree theft count while demonstrating or displaying an egregious lack of remorse. CP 342.

Post-conviction, Shaw moved for arrest of judgement and a new trial. CP 350. After hearing, those motions were denied. RP, 3/5/17, 13.

Shaw was sentenced within the standard range to 45 months on the burglary charge. CP 413. On the third degree theft charge, Shaw was sentenced to 364 days concurrent. *Id.* On the second degree theft charge, the trial court imposed an exceptional sentence of 45 months based on the jury's finding of lack of remorse. *Id.* This second 45 months is concurrent with the 45 months on the burglary charge. CP 415.

B. FACTS

The case involves two incidents: counts I and II come from an incident at a Sprint store in Port Orchard; counts III and IV arise from an incident at a Sprint store in Silverdale. CP 107. Both incidents happened on March 8, 2016. CP 107.

1. Port Orchard Incident

The Port Orchard Sprint store was equipped with video surveillance. 2RP 98. The store includes a counter with a door behind it leading to a back room. 2RP 101. Stock hung from the back walls to either side of the counter but no merchandise was actually behind the counter. 2RP 102. A customer accessing the items on the back wall would move past the end of the counter. 2RP 106, 141. There is no merchandise to purchase behind the counter. 2RP 115. The behind the counter space is for employees only. 2RP 115-16, 117. No signs or barriers demarcate the area behind the counter as employees only. 2RP 142. Behind the counter there are storage drawers, a cash drawer, a cash register, and a computer. 2RP 116.

Two men entered the store; one dressed in a dark color hoodie and one wearing an orange, reflective vest. 2RP 108-09. Antoine Shaw was identified as the one in the reflective vest. 2RP 110. One man enquired about an iphone and prepaid phone while the other looked at phones. 2RP 109. The clerk sold a phone plan to the man in the dark hoodie and while that happened the other man, Shaw, asked for an iphone. 2RP 109. Selling the phone plan included a credit check that required the man in the hoodie to provide driver's license and social security number. 2RP 112. He was identified as Gary Harrison. 2RP 113.

The clerk went to the back to retrieve the iphone that Shaw had

requested. 2RP 114. The clerk brought the iphone out, Shaw asked to see another kind of phone, and the clerk placed the iphone under the counter. Id. The clerk went in back to get the other phone and when she returned the iphone was gone. Id. Shaw was also gone but Harrison was still there. 2RP 118. Surveillance video showed Shaw move behind the counter and reach to the location where the clerk had left the iphone. 2RP 122. The video shows the white iphone box in Shaw's hand. 2RP 123.

The clerk asked Harrison about his friend and the iphone. 2RP 118. Harrison went out and returned and eventually Shaw came back into the store. 2RP 118. The clerk asked about the iphone, Shaw said he could not afford it. 2RP 118. Shaw then complained that the clerk was accusing him of stealing. 2RP 119. Harrison took his purchased phone and the two left. Id. They left behind video images from multiple angles and Harrison's name and phone number. 2RP 156.

Armed with Harrison's name, they looked him up on Facebook and found a picture of Shaw on his page. 2RP 124. The store manager called Harrison and asked him to return the iphone. 2RP 157. Then, Shaw called the manager and said he wanted to meet to return the phone that he had stolen. 2RP 161. Shaw was given until close of business that day to return the phone without law enforcement involvement but he never returned and the police were called. 2RP 162.

2. Silverdale Incident

Employees at the Silverdale Sprint store described the same two men entering the business. 2RP 168. The men were described by the dark hoodie and the reflective vest. Id. Shaw, wearing the reflective vest, asked about an iphone while the other man looked at demo iphones. 2RP 169. The clerk went in back to ask another employee the answer to Shaw's question. 2RP 170. When he came back, a phone alarm sounded and Harrison put phones in his pocket and ran to the front door. 2RP 170. It was immediately apparent that two phones were missing. 2RP 171. Shaw tried to follow Harrison out the door but the store employee was trying to lock the door. 2RP 172. Shaw shoved the employee aside and got out the door. 2RP 172-73². All of this activity was captured on surveillance. 2RP 174-75.

In a picture (exhibit 13), Shaw can be seen with paper or money in his hand. 3RP 256. Law enforcement opined that Shaw displayed the money as a "prop" to show the clerk how serious he was about buying a phone. 3RP 256.

Law enforcement later interviewed Shaw regarding these thefts. 2RP 220. Shaw denied any knowledge of the thefts; denied knowing Harrison; denied being the person in the surveillance videos. 2RP 221. Shaw was

disinterested in the discussion. 2RP 221-22. Interviewing officers noticed that Shaw's shoes matched those of the perpetrator in the surveillance videos. 2RP 222-23.

Shaw was recorded during jail phone calls. 3RP 236.³ Shaw is heard to say that he is "addicted to fast money." CP 123. He blames Harrison for his situation: he is in jail because someone else stole something while he was present (CP 124) and he would not be in jail if he had not been with a greedy "unskilled mother fuckers." CP 126. He refers to the two incidents as "some little shit." CP 128. He claims that the same behavior in another county would not have resulted in his being in jail. CP 130.

III. ARGUMENT

A. THE EVIDENCE WAS SUFFICIENT TO ESTABLISH BOTH THAT SHAW UNLAWFULLY ENTERED AN EMPLOYEE-ONLY AREA OF A BUSINESS TO COMMIT THE CRIME OF THEFT OR THAT SHAW UNLAWFULLY REMAINED IN THE BUSINESS WITH INTENT TO COMMIT THEFT.

Shaw argues that insufficient evidence supports the conviction for second degree burglary. Shaw claims that there is a lack of substantial

² This part of the story constituted the assault charge that was dismissed by the trial court.

³ Redacted calls were admitted on CDs as exhibits 30, 32, 34, 36, and 38. Exhibits 31,

evidence that he unlawfully entered or remained in the Port Orchard Sprint store. This claim is without merit because Shaw's behavior satisfied the unlawfully enters or remains element of burglary by either unlawfully entering an area of the business not open to the public or, after having lawfully entered the open business, by unlawfully remaining with intent to commit theft.

It is well settled that evidence is sufficient if, taken in a light most favorable to the state, it permits a rational trier of fact to find each element of the crime beyond a reasonable doubt. *State v. Pirtle*, 127 Wn.2d 628, 643, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). A claim of insufficiency admits the truth of the state's evidence and all reasonable inferences that can be drawn therefrom. *State v. Moles*, 130 Wn. App. 461, 465, 123 P.3d 132 (2005), *citing State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). Thus the relevant inquiry is "whether, after viewing the evidence

33, 35, 37, and 39 are transcription of those CDs and are in the record at CP 123-131.

in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Scoby*, 117 Wn.2d 55, 61, 810 P.2d 1358 (1991). “The sufficiency of the evidence is a question of constitutional law that we review de novo.” *State v. Rich*, 184 Wash.2d 897, 903, 365 P.3d 746 (2016).

Second degree burglary occurs “if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building other than a vehicle or a dwelling.” RCW 9A.52.030 (1). The term “enter” in the statute “shall include the entrance of the person, or the insertion of any part of his or her body, or any instrument or weapon held in his or her hand and used or intended to be used to threaten or intimidate a person or to detach or remove property.” RCW 9A.52.010 (1). And, “[a] person “enters or remains unlawfully” in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain.” RCW 9A.52.010 (2). Further, “a license to enter or remain in a building which is only partly open to the public is not a license or privilege to enter or remain in that part of a building which is not open to the public.” RCW 9A.52. 010 (2) (the jury was so instructed. Instruction 11, CP 319. Shaw concedes that the evidence was sufficient to allow a finding that Shaw had intent to commit

a crime while at the Port Orchard Sprint store. Brief at 12.

Thus, unlawful remaining can occur even though the initial entry was lawful. *State v. Allen*, 127 Wn.App 125, 133, 110 P.3d 849 (2005). “Regardless of whether the defendant possessed an intent to commit a crime at the time of the unlawful entry, if the defendant unlawfully remains with the intent to commit a crime, we see no reason such conduct does not satisfy the requirements for burglary.” *Id.* Moreover, no precise regulatory code was necessary to sustain the convictions in *Allen*. Things like required check-in of visitors, signs, and the restrictive lay-out of the buildings involved were sufficient to establish unlawful remaining even though the buildings were otherwise open to the public. *Id.* at 137-38.

These principles show that in a case where a defendant enters an open business, the question of unlawful entry onto the premises is irrelevant. Even if a defendant enters the front door possessed of intent to commit a crime, his entry is not unlawful because the door into the premises is open to the public. *See State v. Miller*, 90 Wn. App. 720, 954 P.2d 925 (1998) (Shaw correctly cites this case for the proposition stated, Brief at 12.). But “[w]here an individual exceeds the scope of his invitation into a building, he has remained unlawfully there.” *State v. Collins*, 110 Wn.2d 253, 255, 751 P.2d 837 (1988). Here, then, Shaw’s guilt is established in either of two ways: that he unlawfully remained by

exceeding the scope of his invitation or that he unlawfully entered by placing himself or any part of his body within the prohibited area. Either way, the element is established in this case.

Since Shaw was captured on video going behind the Sprint store counter and actually taking the phone, the evidence of his criminal behavior is not in dispute. Anyone, particularly an “unprejudiced thinking mind,” actually seeing this behavior would easily be persuaded of the “truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn. App. 545, 557, 513 P.2d 549 (1973) (Horowitz, J., dissenting). Thus substantial evidence was adduced in the case. It appears that Shaw’s complaint here is less about the quantum or quality of the evidence and more about the import of that evidence as a matter of law.

Shaw argues that his presence in the employee-only area behind the counter and his stealing of the phone does not constitute burglary because “a reasonable person would believe that this area was impliedly open to the public.” Brief at 13. This because the store intended the area behind the counter was for employees only, because there were no prohibiting signs or barriers, because there was merchandise on the back wall adjacent to the counter, because other customers had walked into the prohibited area before, and because no one had been accused of trespassing for straying behind the counter. Brief at 13.

First, Shaw cites no authority that establishes the general proposition that a reasonable person's belief about implied openness of an area of a business forecloses a burglary prosecution. In fact, "it is the consent, or lack of consent, of the residence possessor, not the State's or the court's consent or lack of consent that drives the burglary statute's definition of who is not then licensed, invited, or otherwise privileged to so enter or remain in a building." *State v. Wilson*, 136 Wn.App. 596, 150 P.3d 144 (2007). Second, at trial the defense offered no testimony indicating that that was in fact Shaw's state of mind. Thus, on this sufficiency claim, Shaw asks this appellate court to engage in speculation that any of the facts he asserts were of consequence to Shaw's behavior or his state of mind. To the contrary, the sufficiency of the evidence standard of review places all reasonable inferences in favor of the guilty verdict not in favor of speculation that Shaw considered that he would be immune from burglary prosecution because of the lay out of the business from which he intended to steal (recalling here that Shaw concedes intent to steal). But, "[t]he fact that a trial or appellate court may conclude that the evidence is not convincing, or may find the evidence hard to reconcile in some of its aspects, or may think some evidence appears to refute or negative guilt, or cast doubt thereon, does not justify the court's setting aside the jury's verdict." *State v. Randecker*, 79 Wn.2d 512, 517, 487 P.2d 1295 (1971).

Similarly, Shaw cites no authority that a business is required to post signs or erect barriers. And, factually, it is incorrect to assert that the back-wall merchandise could not be accessed without walking into the area. The witnesses testified that the merchandise was to the side of the counter and a person would walk past the counter, not behind it. 2RP 102, 106, 115. In fact, Shaw's trial counsel conceded the lack of product for sale behind the counter in Shaw's post-trial motion in arrest of judgement. CP 350, 351 ("There were no items for sale directly behind the counter."). And, finally, Shaw cites no authority for the proposition that since no one else had been charged with a crime for straying behind the counter, neither should Shaw. What others may or may not have done is irrelevant to what Shaw did. Likely that these others did not so clearly show that they were remaining in that business for the purpose of stealing from the business.

Simultaneously, as seen on a surveillance video, Shaw violated the scope of his initial lawful entry into the business and clearing exhibited his co-occurring intent to commit a crime by actually committing one. Had the clerk handed him the phone in the publicly open area of the store and had he then fled with the phone, his argument here would have merit. But here Shaw took the extra step of going into an employee-only area to commit the theft. The evidence was sufficient to establish the elements of the offense.

B. THE EVIDENCE ESTABLISHES THAT SHAW ACTED IN CONCERT WITH HIS CONFEDERATE HARRISON BY SHAW'S OBVIOUS ATTEMPTS TO DISTRACT THE STORE CLERK AND BY HIS OWN STATEMENTS ABOUT THE THEFT AND HE AND HARRISON'S PARTICIPATION.

Shaw next claims that there is insufficient evidence to support the conviction for second degree theft because the evidence does not prove that Shaw acted as an accomplice to that crime. Here, Shaw concedes that the evidence establishes that Shaw was aware that the codefendant intended to commit theft at the Silverdale Sprint store. Brief at 19. But he claims that he was merely present when the crime was committed. *Id.* This claim is without merit because Shaw acted to distract the store clerk so that Harrison could more easily steal the phones and because Shaw's statements to others on jail phone calls show that he, Shaw, brought Harrison into the criminal enterprise, which fact in turn bottoms a reasonable inference that Shaw engaged in solicitation and planning of the theft.

On this insufficient evidence claim, the same standards as in the immediate previous issue apply. *Supra* at 7-8. In short, Shaw must show that, taking the evidence in a light most favorable to the state, and taking that evidence as true and all reasonable inferences therefrom, no rational trier of fact could have found the contested element beyond a reasonable

doubt. Here the evidence, and in particular the reasonable inferences therefrom, is sufficient under this standard.

The jury was instructed on accomplice liability:

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

- (1) solicits, commands, encourages, or requests another person to commit the crime; or
- (2) aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

Instruction 22, CP 330. The instruction is WPIC 10.51 (11 Wash. Practice, Pattern Jury Instructions Criminal (4th Ed.)), which is drawn from the accomplice statute RCW 9A.08.020 (3). This instruction requires that Shaw know that he is promoting or facilitating the crime, here theft. Not too much else is required: "Accomplice liability represents a legislative decision that one who participates in a crime is guilty as a principle,

regardless of the degree of participation.” *State v. Hoffman*, 116 Wn.2d 51, 104, 804 P.2d 577 (1991) (En Banc) (citation omitted). Thus, merely promoting, though not directly engaging in, the crime suffices. *See State v. Walker*, 182 Wn.2d 463, 482-83, 341 P.3d 976 (2015) (En Banc) *cert. denied* 135 S.Ct. 2844 (2015). “[T]he state need not prove that the principle and accomplice share the same mental state.” *Hoffman*, 116 Wn.2d at 104, *quoting State v. Guloy*, 104 Wn.2d 412, 431, 705 P.2d 577 (1985). Moreover, the knowledge requirement ensures that an accomplice's actions are “directed at and likely to incite or produce imminent lawless action” without prohibiting “mere advocacy of law violation” in general. *State v. Ferguson*, 164 Wn. App. 370, 376, 264 P.3d 575 (2011).

The testimony regarding the Silverdale crime established that the two men arrived together. 2RP 168. One, Shaw, went directly to the clerk and asked a question while the other, Harrison, stole two phones. 2RP 169. It is a completely reasonable inference from these facts that Shaw’s intention was to distract the clerk so that Harrison could more easily complete the theft. Next, the record shows that when Harrison fled with the phones. 2RP 170. Shaw hastened to follow even engaging in a tussle with the clerk so that he could escape. 2RP 172. Again it is a completely reasonable inference from that fact that Shaw knew he had successfully

distracted the clerk allowing Harrison to more easily take the phones and, realizing his complicity, wanted badly to flee along with his confederate. Similarly, the law enforcement officer's unchallenged opinion that Shaw was holding "prop" money in his hand in order to fool the clerk into believing he was a legitimate customer further supports the inference that Shaw was there to act in concert with Harrison. 3RP 256.

Further still, in his jail phone calls Shaw reveals his participation in the scheme by noting his addiction to fast money. CP 123. In another call Shaw says

"none of this shit would have happened if I would have just been by myself...doing my own thing because every time I get mixed up with some mother fuckers they don't know how to do it right and they are always doing some off the wall shit."

CP 126. And, again, "I put myself in this situation by being with some unskilled mother fuckers." CP 126. He goes on as to how he puts his confederates "on money" but they don't do the crime right. Id. Thus, by his own words Shaw showed the jury that he was in the plan with Harrison. In fact the quite reasonable inferences from Shaw's words is that he was in fact the mastermind and Harrison his poorly prepared pupil.

Any rational jury could have made such a finding. This without even considering the fact that this jury knew of Shaw's and Harrison's entire spree. The jurors obviously knew of the two quite similar incidents in the case. The above review of the evidence shows sufficiency without

running afoul of the jury's duty to decide each count separately. The evidence was sufficient to establish that Shaw was more than merely present in the Silverdale Sprint store when Harrison grabbed the phones and fled.

C. SHAW'S BRAZEN BEHAVIOR AND MINIMIZING STATEMENTS SHOW AN EGREGIOUS LACK OF REMORSE.

Shaw next claims that the jury's verdict on the special interrogatory of lack of remorse was not based on substantial evidence. This claim is without merit because Shaw demonstrated a brazen and remorseless attitude toward his crimes.

Aggravating circumstances that justify an upward departure from the standard range are found in RCW 9.94A.535; subsection (3) (q) allows a departure upon a jury's finding that "the defendant demonstrated or displayed an egregious lack of remorse." As the plain language suggests, a mere lack of remorse is insufficient: "the lack of remorse must be of an aggravated or egregious nature." *State v. Ross*, 71 Wn. App. 556, 563, 861 P.2d 473 (1993), *review denied*, 123 Wn.2d 1019 (1994), *citing State v. Wood*, 57 Wn. App. 792, 800, 790 P.2d 220 (1990), *review denied*, 115 Wn.2d 1015 (1990).

Here, again, the same standard of review applied to the elements of a crime apply to review of a claim that insufficient evidence supports an aggravating factor. The evidence is reviewed in the light most favorable to the state in determining whether any rational trier of fact could have found the aggravating circumstance beyond a reasonable doubt. *State v. Zigan*, 166 Wn. App. 597, 601-02, 270 P.3d 625 (2012), *review denied*, 174 Wn.2d 1014 (2012). Here too circumstantial and direct evidence are equally reliable. *State v. Yates*, 161 Wn.2d 714, 752, 168 P.3d 359 (2007). And, a claim of insufficiency in this context admits the truth of the state's evidence and all reasonable inferences drawn therefrom. *State v. Yarbrough*, 151 Wn. App. 66, 96, 210 P.3d 1029 (2009).

The evidence showed Shaw to be a rather brazen thief. This is seen in the Port Orchard incident when Shaw takes the phone and then returns to the store and confronts the clerk for accusing him of theft. 2RP 118-19. This is also seen by the circumstances: it was likely obvious that the stores had video surveillance. Yet this brazen thief is unmoved by the possibility that he will be seen doing his work.

The jury would have also considered Shaw's own statements from the jail. He refers to his crimes as "some little shit." CP 128. He laments that he would not have been caught but for his inclusion in his scheme of a neophyte. CP 126. He opines that in another county he would not even be

in jail. CP 130. His statements in total firmly establish his brazen and remorseless attitude toward these crimes. Moreover, credulity is not stretched at all in observing that the brazenness of Shaw's attitude allows a finding of an "egregious" lack of remorse. In any event, in a light most favorable to the state, the evidence is sufficient.

IV. CONCLUSION

For the foregoing reasons, Shaw's conviction and sentence should be affirmed.

DATED September 28, 2017.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "John L. Cross", written over the printed name.

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